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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 579

DIONYSIA E. TSERIONI AND POLYTIME ANTONOPULO, ETC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 7–14) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered June 2, 1941 (R. 14). The petition for a writ of certiorari was filed on September 2, 1941 (R. 14). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether a claim for refund of customs duties accrues at the time the duties are finally determined to have been erroneously assessed or only upon demand by the importer for payment.

2. Whether the drawing of checks by the Collector of Customs to the order of an importer in the amount found to be erroneously assessed, and the transmittal of these checks by the Collector to the Comptroller General as an outstanding liability of the United States, creates a new cause of action on which suit may be brought in the Court of Claims within six years after the date the checks were drawn.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix, pp. 9–14.

STATEMENT

The facts, as alleged in the petition in the Court of Claims, are as follows:

Eustadio D. Papavasilopulo was engaged in the business of importing in New York City during the years of 1905 to 1909, inclusive (R. 2). Papavasilopulo imported and was the ultimate consignee of certain mechandise imported during those years at the Port of New York (R. 2). In order to secure the release of the merchandise, the importer paid certain import duties assessed by the Collector of Customs (R. 2). On appeal,

the Board of General Appraisers, which then had jurisdiction of such matters, made a determination that part of the imported merchandise was free of duty (R. 3). Thereafter, during the years 1910 to 1912, the importer's entries were duly liquidated, in accordance with the decision of the Board, by the Collector of Customs for the Port of New York (R. 2–3) and the amount due the importer was determined to be $19,603.34 (R. 2–3).

On June 25 and 26, 1934, almost twenty-five years after liquidation, the Collector of Customs of the Port of New York drew checks totalling $19,603.34 to the order of the importer, and transmitted them to the Comptroller General as an outstanding liability of the United States (R. 4). On October 13, 1936, the Comptroller General (16 Comp. Gen. 365) refused to make payment of the refunds represented by the checks, on the ground that the importer was indebted to the United States, and that the refunds were to be used in partial offset of the Government's claim (R. 5–6). The petition denies the existence of any such debt owing to the United States (R. 6).

Petitioners, the living heirs of the importer, instituted this suit in the Court of Claims on June 20, 1940 (R. 1), to recover $19,603.34 (R. 6–7). The Government demurred to the petition and the case was argued and submitted on the demurrer (R. 7). The court below dismissed the

petition on the ground that under the pertinent customs statute, the cause of action accrued not later than 30 days after the liquidation by the Collector of the entries in question in 1910, 1911, and 1912, and that consequently the suit was barred by the six-year statute of limitations applicable to actions brought in the Court of Claims.

ARGUMENT

1. The decision of the court below that the six-year statute of limitations (Jud. Code, sec. 156, 28 U. S. C., sec. 262) began to run when the Collector of Customs liquidated the importer's entries in accordance with the unappealed decision of the Board of General Appraisers, and that no further demand by the importer was necessary, is correct. Sections 14, 15, and 24 of the Act of June 10, 1890, as amended by the Act of May 27, 1908, imposed the duty upon the Secretary of the Treasury, after final liquidation by the Collector, to make refund of the duties found by the Board to have been illegally exacted.

The right of action therefore arose not later than the date of final liquidation after the decision of the Board of General Appraisers, unless a demand for payment was necessary to perfect the claim.[1] *Patterson* v. *United States,* 21 C. Cls.

[1] Final liquidation by the Collector occurred after the decision of the Board (R. 3), and the claim accrued, at the latest, at the expiration of the thirty days allowed for a possible further appeal to the Board or to the circuit court. Sec. 15 of the Act of June 10, 1890, as amended.

322; *Ravesies* v. *United States,* 21 C. Cls. 243; *Nitro Chemical Corp.* v. *United States,* 71 C. Cls. 453; *Francesco Pacifico* v. *United States,* 80 C. Cls. 391; cf. *First Nat. Bank of Greencastle* v. *United States,* 15 C. Cls. 225. Nothing in the provisions of the statute expressly requires a demand by the importer as a condition precedent to his right to the refund or to the Secretary's duty to make payment. Nor is there any reason to imply such a requirement. Petitioners' sole argument to the contrary is that duties paid constituted a "deposit" and that on general principles a demand is a condition precedent to recovery of a deposit. This contention is without substance. The moneys erroneously collected were merely "payments" of duties, as clearly appears from the statute.[2] See *Barney* v.

[2] If the opinion in *Brune* v. *Marriott*, 4 Fed. Cas. No. 2052 (C. C. D. Md., 1849), be construed as supporting petitioners' theory, the opinion is directly contrary to the views expressed by this Court in the *Barney* case. While this Court there approved the holding of the *Brune* case, it disapproved a contention that the moneys paid as duties were a "deposit" and expressly refrained from approving the language of the opinion in the *Brune* case on which petitioners rely (Pet. 9).

In the analogous case where taxes are paid which are subsequently determined by the Board of Tax Appeals or the Commissioner to have been illegally assessed, it is settled that the claim accrues at the time of the final determination, for purposes of suit under the Tucker Act. *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265; *First Nat. Bank of Greencastle* v. *United States*, 15 C. Cls. 225, 228–229; *Ohio Steel Foundry Co.* v. *United States*, 69 C. Cls. 158, 167; *James* v. *United States*, 69 C. Cls. 215, 220; *National Fire Ins. Co.* v. *United States*, 72 C. Cls. 663, 669.

Rickard, 157 U. S. 352, 358–359, 363–364. Section 14 of the Act of June 10, 1890, provides that an importer dissatisfied with a decision of the Collector "as to the rate and amount of duties chargeable * * * shall * * * give notice in writing to the collector * * * and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon." Provision is made for an appeal to the Board of General Appraisers "upon such notice and payment."

The decisions in *United States* v. *Wardwell,* 172 U. S. 48, *United States* v. *Taylor,* 104 U. S. 216, and the lower court cases cited by petitioners (Pet. 15–18), that the funds there in question were held by the United States in a type of trust account and that therefore a right to payment did not arise until a demand for payment was made, are not in point. They turn upon the particular provisions of the applicable statutes there involved, provisions which, as the court below correctly held, differ significantly from the Act of June 10, 1890, and expressly envisage the holding of the funds by the United States on behalf of the claimant and a demand for payment.[3]

[3] Article 1082 of Customs Regulations (1908), which refers to refunds of "deposits" and which petitioners assert governed the importer's claim for a refund (Pet. 8), does not pertain to the refunding of ascertained duties found by the Board of General Appraisers to have been illegally exacted. Under the 1908 regulations, such refunds were made

2. Petitioners also urge that a new cause of action arose upon the drawing of checks in 1934 to the order of the importer, and assert a conflict on this point between the decision of the court below and *United States* v. *Wardwell,* 172 U. S. 48. But in that case, the checks were delivered to the claimant and lost by him, and the funds checked against were thereafter covered into the "outstanding liability" account of the Treasury pursuant to statutory direction. The opinion of the court rests wholly upon the trust relationship created by the deposit of the funds in the Treasury accounts in accordance with Rev. Stats. secs. 306, 307, 308 (31 U. S. C., sec. 149, 150, 151). Here, on the other hand, the petition in the Court of Claims admits that the checks were never delivered to the importer or his representative, and there is neither an allegation that the Collector intended delivery of the checks to the importer nor an allegation that the funds checked against have been covered into the "outstanding liabilities" account.[4] Accordingly, there can be no conflict with the *Wardwell* case. And, of

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only after the transmittal of certified statements to the Secretary of the Treasury, and not from the collector's "Excess of Deposits Account." Customs Regulations (1908), Arts. 1061, 1069, 1076, 1084.

[4] While the petition alleges that the checks were transmitted to the Comptroller General "as an outstanding liability of the defendant" (R. 4), it is nowhere alleged that the funds checked against were covered into the "outstanding liabilities' account" of the Treasury.

course, the mere drawing of the checks without delivery to the importer creates no liability on the part of the United States. *Good* v. *Martin*, 95 U. S. 90, 96; *Young* v. *Clarendon Township*, 132 U. S. 340, 353; Uniform Neg. Instr. Act, sec. 16; *Irving Trust Co.* v. *Leff*, 253 N. Y. 359, 363 (1930). The events of 1934 were intradepartmental only; the matter was still *in fieri*, and, therefore, never ripened into an account stated. Cf. *Daube* v. *United States*, 289 U. S. 367, 372.

CONCLUSION

The decision of the court below was correct and there is no conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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